

1 Budge & Heipt, PLLC
808 E. Roy St.
2 Seattle, WA 98102
(206) 624-3060
3
4
5

6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
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8 THE ESTATE OF CINDY LOU HILL, by
and through its personal representative,
9 Joseph A. Grube; and CYNTHIA
METSKER, individually,

10 Plaintiffs,

11 vs.

12 NAPHCARE, INC, an Alabama
corporation; HANNAH GUBITZ,
13 individually; and SPOKANE COUNTY,
a political subdivision of the State of
14 Washington,

15 Defendants.
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No. 2:20-cv-00410-MKD

PLAINTIFFS' MOTIONS *IN LIMINE*

For consideration at Pretrial Conference

PLAINTIFFS' MOTIONS *IN LIMINE*

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

I. INTRODUCTION

Plaintiffs move *in limine* to exclude the following evidence at trial: (1) opinion testimony from witnesses not disclosed as experts; (2) any evidence or argument from Defendant Spokane County suggesting it is not liable to Plaintiffs under 42 U.S.C. § 1983 or for negligence, or suggesting that its liability should be “minimized”; (3) evidence that the reason for Cindy Hill’s pretrial confinement in August, 2018 was for a felony charge; (4) evidence of Cindy Hill’s criminal history; (5) evidence of Cindy Hill’s medical history before August, 2018; and (6) evidence of Cynthia Metsker’s criminal history. Exclusion of these categories of evidence is appropriate since the evidence can be determined inadmissible outside the context of trial and because its exclusion will avoid needless objections and argument during trial.

II. ARGUMENT

1. Opinion Testimony from Witnesses Not Disclosed as Experts is Inadmissible Under Fed. R. Civ. P. 26(a)(2) and 37(c)(1)

Fed. R. Civ. P. 26(a)(2)(A) imposes a duty on all litigants to “disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703 or 705.” The disclosure of such testimony must be made “at the times and in the sequence that the court orders.” Fed. R. Civ. P. 26(a)(2)(D). In this case, the Court imposed a deadline of December 18, 2021 for all parties to disclose any anticipated expert testimony. ECF 14 at pp. 3-4.

1 The rules impose two distinct disclosure requirements, depending on whether
2 the purported expert is retained or non-retained. For retained or specially employed
3 experts, a complete and detailed report must be provided that meets all the
4 requirements of Fed. R. Civ. P. 26(a)(2)(B). For persons who have not been retained
5 or specially employed, but who nevertheless might offer opinion testimony, no
6 report is required but the offering party must nevertheless properly identify that
7 person as an expert and specifically disclose: (i) the subject matter on which the
8 witness is expected to present evidence under Fed. R. Evid. 702, 703 and 705; along
9 with (ii) a summary of the facts and opinions about which the witness is expected to
10 testify. *See* Fed. R. Civ. P. 26(a)(2)(C).

11 In the case of non-retained or specially employed witnesses, the mandated
12 disclosure (though it need not be in the form of a report) must be specific and
13 sufficiently detailed. It must disclose the actual opinions the witness will testify to,
14 and the factual bases of those opinions (i.e., the “how” and the “why”). *See*
15 *O’Daniel v. Arizona Hay & Feed, LLC* No. CV-20-02224, 2022 U.S. Dist. LEXIS
16 82532 *7-9 (D. Ariz. May 6, 2022) (summarizing requirements for disclosure of
17 expected testimony of non-retained experts).

18 Fed. R. Civ. P. 37(c)(1) prohibits a party from offering any expert testimony
19 not disclosed pursuant to the requirements of Fed. R. Civ. P. 26(a)(2). *See O’Daniel,*
20 *supra* at *9. *See also, Merchant v. Corizon Health, Inc.* 993 F.3d 733, 740-41 (9th
Cir. 2021) (affirming exclusion of non-retained expert for failure to satisfy
disclosure requirements). Rule 37(c)(1) “is an ‘automatic’ sanction that prohibits the

1 use of improperly disclosed evidence” and which mandates the exclusion of such
2 evidence unless the party proposing to offer it can show that non-compliance with
3 the expert disclosure rule was either substantially justified or harmless. *Merchant*,
4 *supra* at 740.

5 In this case, Defendants NaphCare and Gubitz provided their expert
6 disclosures on December 17, 2021. *See* Decl. of Edwin S. Budge, Ex. 1. They
7 identified three experts, all specifically retained, and provided three expert reports
8 which were later supplemented. *Id.*¹ Other than those three retained experts,
9 NaphCare and Gubitz did not disclose any other person who might offer opinion
10 testimony at trial. *Id.*

11 On May 12, 2022, NaphCare and Gubitz identified Dr. Jeffrey Maple, the
12 former NaphCare Medical Director at the Spokane County Jail as a witness they
13 expect to call at trial. *See* ECF 100 at p. 3. In their description of his expected
14 testimony, Defendants state that Dr. Maple “will testify regarding his opinions of the
15 care and treatment by NaphCare and RN Gubitz and the challenges of providing
16 healthcare in a jail facility. Dr. Maple will also testify regarding his review of Ms.
17 Hill’s death.” *Id.*

18 Despite having never been disclosed as someone who will offer opinion
19 testimony, the description of Dr. Maple’s anticipated testimony makes it apparent

20 ¹ Plaintiffs contend that two of these reports are insufficient and that supplemental
motions pending before the Court.

1 that Defendants NaphCare and Gubitz intend to use him as an expert. It is
2 undisputed that Dr. Maple was not involved in Ms. Hill's care leading up to her
3 death. He is not a percipient witness to any of the events in question. Although he
4 may have some relevant factual testimony to offer (e.g., as it relates to the policies
5 and procedures of NaphCare) he should not be permitted to offer his opinions about
6 Ms. Hill's "care and treatment," general opinions about "challenges of providing
7 healthcare in a jail facility," or any related opinion testimony because he was never
8 disclosed as someone who might provide opinion testimony, as required by Fed. R.
9 Civ. P. 26(a)(2)(C). Defendants NaphCare and Gubitz cannot show that their failure
10 to disclose Dr. Maple's expected opinion testimony by the Court's deadline of
11 December 18, 2021, is either harmless or substantially justified. Accordingly, any
12 opinion testimony from Dr. Maple should be excluded.

13 The same reasoning applies to all other non-retained witnesses identified by
14 Defendants NaphCare and Gubitz (ECF 100). For instance, these defendants have
15 listed many of Defendant Gubitz's former nursing colleagues, Dr. Jeffrey Alvarez
16 (current Chief Medical Officer for NaphCare), various personnel associated with the
17 autopsy of Ms. Hill, and Defendant Gubitz herself. Defendants NaphCare and
18 Gubitz do not explicitly state that any of these witnesses will offer opinion
19 testimony, and Plaintiffs have no objection to their testimony to the extent it is
20 relevant and factual. But to the extent any such witness is asked to express opinions
under Fed. R. Evid. 702, 703 or 705, such testimony should be excluded because

1 these witnesses were never disclosed as individuals who might offer such testimony
2 per Fed. R. Civ. P. 26(a)(2)(C).

3 **2. Evidence, Testimony or Argument from Defendant Spokane County**
4 **Designed to Dispute or “Minimize” Liability**

5 The Court granted Plaintiffs’ motion for default judgment against Defendant
6 Spokane County, establishing liability against it on Plaintiffs’ “negligence and §
7 1983 claims.” *See* ECF 88 at 44. Thereafter, the Court entered a default judgment as
8 to liability “in favor of Plaintiffs on their negligence and § 1983 claims against
9 Defendant Spokane County.” ECF 94. As to Spokane County, the only remaining
10 issue for the jury is “a determination of damages.” ECF 88 at 44.

11 Although liability against Spokane County is now conclusively established,
12 the County filed its Trial Exhibit List (ECF 97) and Trial Witness List (ECF 98)
13 with no apparent recognition of this fact. The County identified more than 30
14 individuals, including various corrections officers and former corrections officers,
15 jail managers, investigating law enforcement officers, emergency medical
16 personnel, and others. ECF 98. With the exception of any individual who might be
17 able to testify about Ms. Hill’s pre-death pain and suffering (and the only such
18 witness listed by the County appears to be Defendant Gubitz) none of these
19 witnesses appear to have any relevant testimony to offer on the subject of damages.
20 The County has not, for example, identified any person able to testify about personal
observations of Ms. Hill’s condition in the hours leading up to her death, or who can

1 testify about Ms. Hill's loss of life damages or damages to Ms. Metsker for the loss
2 of love, society and companionship of her mother.

3 The County has also identified more than 80 trial exhibits. ECF 97. These
4 include brief video clips showing Ms. Hill being transported by wheelchair to the
5 "medical watch" section of the jail, jail floor plans, shift logs and schedules, various
6 reports of corrections officers and law enforcement officers, jail policies, and other
7 records that have no relevance to damages. Though limited portions of some
8 exhibits (e.g. the few exhibits documenting Ms. Hill's pain and suffering in the
9 hours before her death) are relevant to damages, the vast majority would only be
10 relevant if the County's liability were still in dispute.

11 In short, the County has identified so many exhibits and witnesses that have
12 no relevance to the subject of damages that the County appears poised to imply,
13 suggest, or even argue that it is not liable to Plaintiffs or that its liability should be
14 discounted or minimized. This should not be allowed. Though the effect of the
15 Court's entry of a default judgment should be obvious (i.e., it renders all evidence
16 and testimony relating to the County's liability irrelevant), the Court should order
17 that the County may not imply, suggest, or argue that it is not liable to Plaintiffs or
18 that its liability should be discounted or minimized. Any effort by the County to do
19 so would be unfairly prejudicial and confusing, while also being irrelevant, in
20 violation of Fed. R. Evid. 403. With regard to any exhibits or testimony the County
actually intends to offer at trial, those exhibits and testimony should be limited to

1 admissible evidence that the County can show at trial is relevant to the issue of
2 damages.²

3 **3. Evidence that the Reason for Cindy Hill's August 2018 Confinement**
4 **was for a Felony Charge**

5 It is undisputed that the decedent, Cindy Hill, was a pretrial detainee, not
6 convicted of any crime, during her approximately five-day confinement in the
7 Spokane County Jail between August 21, 2018 and her death on August 25.
8 According to charging documents identified in the Exhibit List of Defendants
9 NaphCare and Gubitz, Ms. Hill was being held on charges relating to possession of
10 a controlled substance in violation of RCW 69.50.4013(1). ECF 99 at p. 4 (Ex. 284);
11 Budge decl., Ex. 2. The charging documents indicate that the charge was a felony
12 charge. *Id.*

13 Although it is appropriate background that the jury be advised that Ms. Hill
14 was a pretrial detainee being held for possession of a controlled substance, the Court
15 should exclude reference to the charge being a felony charge. Whether Ms. Hill's
16 confinement was for a felony or a misdemeanor charge is irrelevant to any of the
17 claims being asserted in this case, especially given her legal status as an unconvicted
18 detainee. Reference to the charge as a "felony" would only serve to unfairly

19 ² Plaintiffs note that many of the witnesses and some of the exhibits identified by
20 the County are also listed by Plaintiffs. There is good reason for this. Some of the
witnesses and exhibits are relevant to establishing Plaintiffs' liability case against
Defendants NaphCare and Gubitz. In other words, some of the witnesses and
exhibits in question are relevant if offered by *Plaintiffs* relative to the two
defendants whose liability remains at issue but have no relevance if offered by the
County.

1 prejudice the jury against her. Since the level of the charge is irrelevant, the
2 evidence should be excluded under Fed. R. Evid. 401-03.

3 **4. Evidence of Cindy Hill's Criminal History**

4 Cindy Hill had a minor criminal history before her August, 2018 confinement,
5 having been confined in the Spokane County Jail briefly in 2016 and 2017. There is
6 no relevance to her criminal history and evidence about it would serve only to
7 prejudice the jury against her character. Yet her general character is not relevant and
8 there is no reason her criminal history is probative of any of the issues the jury will
9 be deciding. Accordingly, evidence of her criminal history should be excluded under
10 Fed. R. Evid. 401-03.

11 **5. Evidence of Cindy Hill's Medical History Before August 2018**

12 Defendants have identified hundreds of pages of Ms. Hill's medical records
13 from the years before 2018 in their exhibit lists. These include records from Ms.
14 Hill's community providers from 2010 to early 2018. *See, e.g.*, ECF 97 (Spokane
15 County's Exs. 258-267); ECF 99 (NaphCare/Gubitz's Exs. 285-88). They also
16 include NaphCare records from Ms. Hill's previous jail confinements before 2018.
17 *See* ECF 99 at Exs. 257-257(c).

18 There is no relevance to medical records predating Ms. Hill's August, 2018
19 confinement. It is undisputed that Defendant Gubitz never considered—or even had
20 access to—Ms. Hill's medical history when making decisions about her care. To the
contrary, Defendant Gubitz admitted in her deposition that she did not look at Ms.
Hill's medical records prior to her first encounter with her on August 25, 2018.

1 Budge Decl., Ex. 3 (Gubitz dep.) at 46:1-4. In fact, she could not recall ever looking
2 at Ms. Hill’s medical records prior to this lawsuit. *Id.* at 193:14-18. Even if she had
3 decided to look at Ms. Hill’s medical records, she only would have seen what was in
4 NaphCare’s system, not historical records from community providers. *Id.* at 46:25–
5 47:4. And because the cause of Ms. Hill’s death is undisputed, these historical
6 records have no bearing on that issue.

7 The apparent reason Defendants want to introduce these records is because
8 some of them, particularly those from certain community providers, paint Ms. Hill
9 in a prejudicial light. There is information in the records that Ms. Hill used illicit
10 drugs, smoked tobacco, sometimes had a hard time providing a clear medical
11 history, missed appointments, failed to follow up on medical referrals, and even
12 spoke in a “raspy” voice characteristic of a long-time smoker. This information is
13 clearly prejudicial—and unfairly so since none of this information makes any fact at
14 issue more or less probable. Whether Ms. Hill was a good patient to other providers,
15 a bad patient to other providers, or even a person who lived an unhealthy lifestyle
16 has nothing to do with the obligations of Defendants NaphCare and Gubitz to
17 provide her with constitutionally adequate care when she was confined at the jail in
18 August of 2018. The information in the records did not inform any decisions by any
19 defendant leading up to her death. And the information is not relevant to the
20 undisputed cause of her death. Accordingly, these records should be excluded under
Fed. R. Evid. 401-03.

1 **6. Evidence of Cynthia Metsker’s Criminal History**

2 Cynthia Metsker is the sole surviving child of Cindy Hill and an individual
3 plaintiff in this case. At the time of her mother’s death, she was 19 years old. She
4 has various criminal convictions, including juvenile convictions. She will likely be
5 called as a trial witness to offer limited testimony relevant solely to her damages for
6 the loss of love, society and companionship of her mother and her mother’s loss of
7 life damages.

8 No defendant has indicated that they have any intent to offer evidence of Ms.
9 Metsker’s criminal history. Under Fed. R. Evid. 609(d), evidence of any juvenile
10 conviction is clearly inadmissible to impeach Ms. Metsker since this is a civil case.
11 And evidence of any adult convictions is not probative to the limited damages
12 testimony Ms. Metsker might offer and would be unfairly prejudicial— especially
13 given the limited subject matter of her testimony. Accordingly, it should be
14 excluded under Fed. R. Evid. 401-03.

15 **III. CONCLUSION**

16 For the reasons described in this motion, Plaintiffs ask the Court to enter an
17 order *in limine* excluding the evidence, testimony and/or argument outlined above.
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1 Respectfully submitted this 27th day of May, 2022.

2 **BUDGE & HEIPT, PLLC**

3
4 /s/ Edwin S. Budge

5 Edwin S. Budge, WSBA #24182

6 Hank Balson, WSBA #29250

7 Erik J. Heipt, WSBA #28113

8 808 E. Roy St.

9 Seattle, WA 98102

10 hank@budgeandheipt.com

11 ed@budgeandheipt.com

12 erik@budgeandheipt.com

13 (206) 624-3060

14 Attorneys for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 The undersigned certifies that on the date stated below this document was
3 filed with the Clerk of the Court for the United States District Court for the
4 Eastern District of Washington, via the CM/ECF system, which will send
5 notification of such filing to the following e-mail addresses:

6 Ketia B. Wick, WSBA #27219
7 Erin E. Ehlert, WSBA #26340
8 Fain Anderson VanDerhoef Rosendahl
9 701 Fifth Avenue, Suite 4750
10 Seattle, WA 98104
11 ketia@favros.com
12 erine@favros.com
13 Attorneys for Defendants NaphCare,
14 Inc., and Hannah Gubitz

John E. Justice, WSBA #23042
Law, Lyman, Daniel, Kamerrer &
Bogdanovich, P.S.
PO Box 11880
Olympia WA 98508
jjustice@lldkb.com
(360) 754-3480
Attorney for Defendant Spokane
County

11
12 Dated this 27th day of May, 2022.

13 /s/ Edwin S. Budge
14 Edwin S. Budge